

A Few Facts

- Most lawsuits arise out of terminations where the employee claims he or she was fired for some unlawful reason, and the employer responds that the employee was fired because of performance or disciplinary issues.

Effective documentation of these issues is absolutely critical to an effective defense against an employment lawsuit. Aside from increasing Milwaukee County's success in litigation, proper documentation of discipline and termination decisions serves many other purposes:

- ◇ Providing a record of communication between the manager and employee,
 - ◇ Helping the employee with clear, written expectations for improved performance, and
 - ◇ Aiding the manager in writing performance reviews.
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- In addition to performance and disciplinary documentation, other types of documentation also have legal implications for employers. For example, an employer's choice of words in the notes from a harassment investigation can greatly affect the employer's chance for success in a subsequent lawsuit.

FAQs

Our employees are subject to written guidelines for their attendance and tardiness, and these guidelines provide that absences over a certain number will result in varying degrees of discipline, depending on the frequency. Can we continue to apply these guidelines to issue a "final notice?"

Some departments do have established written guidelines that follow a three-step warning process (verbal warning, written warning, then a final warning) before termination. Unless your department already has those written guidelines, you should not use the term "final warning" or "final notice" in your documentation.

It is my understanding that we are not supposed to provide employees with a letter explaining the reason for termination. If that is the case, why are we documenting the reasons for termination?

Any termination decision must be thoroughly documented to ensure that you have completely captured all the reasons for termination. We do not give this document to the employee at the time of the termination meeting, but we do keep this document in the employee's personnel file.

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Milwaukee County Human Resources Department

Effective Documentation



Policy or Practice Implications: "The Do's and Don'ts"

Do's and Don'ts

DO document any significant incidents and the reasons for any disciplinary or termination decision.

⇒ Maintain documentation of any significant incident, even if the incident does not result in a written warning.

DON'T "pad the file" or create unnecessarily lengthy documents.

⇒ Include enough information to tell the story, but only include information that is actually relevant to the disciplinary or termination decision.

⇒ Consider whether the amount and timing of the documentation makes sense.

• *Is there a flurry of performance or disciplinary documentation immediately after some other unrelated event, such as a harassment complaint or a leave of absence?*

• *If so, why wasn't there any documentation of these issues before that event? It may be that the employee's performance issues did not occur until after that event. In that case, it is even more critical to document the date when the performance issues first arose.*

DO ensure that managers give comprehensive, honest performance appraisals.

⇒ An **honest assessment is critical**: remember that most juries believe the **performance appraisal is the best evidence of performance**.

⇒ Performance appraisals must consider the entire review period, not just recent performance.

DON'T use the term "final notice" or "final warning" unless you are following written guidelines that specifically provide for this progressive disciplinary step.

⇒ Use of the term "final notice" or "final warning" gives employees the impression that they will always get a "final" warning before termination, even if they already received a previous warning.

⇒ Use of the term "final" warning also implies that the employee received a previous warning. If that was not the case, the employee may argue that a "final" warning was premature

DON'T make subjective conclusions, especially conclusions about the cause of an employee's behavior. For example:

"Bill is a violent man, most likely because of his manic depression."

"Jeff is paranoid and appears to be on drugs."

DO focus on the specific, objective facts:

What was said (including specific words)

"At 10:30 a.m., in the office, I heard Bill say: 'You better be careful driving home tonight. Bad things could happen.'"

How it was said (including any physical gestures or expressions)

"Richard's face was red, he raised his voice and pounded his fist, and he said ..."

Personal feelings in reaction to what was said

"Susan told me she felt threatened by what Patrick said to her."

DON'T make unnecessary controversial statements.

"Joe flirts with all the women in the office. This time he just went too far."

DO make a record of your reasoning. Explain the underlying facts for any conclusions, and how you discovered those facts.

For example:

"Mary told me that Joe rubbed her neck on three occasions, twice after she asked him to stop."

DON'T make legal conclusions.

⇒ Instead of saying: "We can accommodate your disability" (which has a legal meaning), you should say: "We can make the following modifications to help you with your medical condition"

DO make the necessary factual determinations about whether an employee's behavior did or did not occur, and whether that behavior violated Company policy.

⇒ Instead of saying, "Joe committed sexual harassment," you should say: "Joe violated the Company's sexual harassment policy."

⇒ If two witnesses have conflicting versions of the facts, decide whether you have enough evidence to support either version, and document the reasons for that decision.